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SUPERSEDEAS IN HABEAS CORPUS PROCEEDINGS.

In the absence of statutory authorization, has a judge the power, in a habeas corpus proceeding, to accept and allow to be filed, a supersedeas bond, pending an appeal; or has he authority to suspend the judgment, pending an application for a writ of error and supersedeas?

In a case where husband and wife have been divorced by a court of competent jurisdiction in this state, the defendant appeared in person and defended the suit, and the decree granted the divorce, also awarding the custody of an infant child to the complainant. Some years thereafter, the defendant in the divorce suit (the mother, say) wrongfully takes possession of the child, still under 14 years of age, and carries it to a remote part of the state. The father follows, and on his petition, a writ of habeas corpus is awarded; upon the hearing, the court awards the custody to the petitioner, the father, and signs an order to that effect. The mother, the defendant in the habeas corpus proceeding, signifies her intention to apply for a writ of error and supersedeas to said judgment, and moves the court to suspend the judgment for ninety days in order to allow her time to apply to the Supreme Court of Appeals for a writ of error and supersedeas, and moves the court to allow her to execute a suspending bond, upon the execution of which the child is to remain in her (the defendant's) custody pending the action of the Supreme Court of Appeals on the petition for a writ of error and supersedeas.

(1) Has the lower court, in the absence of express statutory authorization, the power and authority to suspend its judgment upon the execution of a suspending bond?

(2) Has the Supreme Court of Appeals, in the absence of express statutory authorization, the power and authority to award a supersedeas, and allow the child to remain in the mother's custody, pending the determination of the appeal?

(3) Is a statute, which authorizes a judgment to be suspended in a habeas corpus proceeding, or permits a supersedeas, constitutional?

I.

The lower court has not either the power and authority to suspend its judgment upon the execution of a suspending bond, or the power to approve and allow to be filed a supersedeas bond, because a judgment in a habeas corpus proceeding is a *self-executing judgment,* and immediately upon the rendition of the judgment and the signing of the order, rights are adjudicated, and nothing further remains to be done to give the judgment effect and force. The courts have noted the distinction between judgments which are self-executing, and those judgments which require something further to be done, after their rendition, in order to give effect thereto. It has been held that in that class of proceedings for the "disbarment" of an attorney; the awarding of license; the granting of an injunction, and in habeas corpus proceedings, the final decrees and orders are *self-executing,* as contradistinguished from that class of cases where there is a decree or order for the payment of money, etc., and in which cases something further remains to be done to give force and efficacy to the judgments, for instance, the issuance of an execution. The authority seems to be to the effect that a supersedeas cannot be given in the case of a self-executing judgment, for the reason that in effect it would be permitting an appellant to continue doing that which is prohibited by the decree or order itself. It has never been contended, so far as I am advised, that upon an appeal from an order refusing to dissolve an injunction, restraining certain acts, that upon the execution of a suspending bond, the very acts which the injunction restrains may be continued, pending the application to the higher court for a writ of error and supersedeas. The only imaginable way that a stay of a self-executing judgment can be had is to reverse, set aside or annull the decree of order. It has been held that statutes providing for a stay of proceedings in civil and criminal cases generally, do not contemplate a stay in babeas corpus proceedings. State *v.* Fenton, 30 Wash. 325, 70 Pac. 741.

The reason for the rule is obvious. Habeas corpus proceedings were designed and intended to secure summary and immediate relief, and, as stated in Willis *v.* Willis, 165 Ind. 332, to suspend a judgment, or allow a supersedeas, in effect would confer upon appellant a right, i. e., to retain the care and custody of the child during the pendency of the appeal, and would result in making a stay of proceedings a remedy granting an affirmative right, rather than a preventative order or writ.

In Willis *v.* Willis, supra, this very question was before the court, and the court declined to suspend the judgment pending appeal or to award a supersedeas, holding that a supersedeas could not operate to give to appellant the right over the judgment to retain the custody of the infant child during the pendency of the appeal, notwithstanding in Indiana there was a general statute providing for a stay of proceedings on judgments pending appeal, upon bond being given.

In Podgett *v.* State, 93 Ind. 396, it was held that an appeal from a judgment of a circuit court awarding an applicant a license to retail intoxicating liquors did not operate to suspend the right of the applicant to take out the license granted to him under the judgment, notwithstanding the giving of a suspending bond, the court assigning as a reason for its conclusion that the judgment was self-executing, and that the entry thereof entitled the applicant to the license without any other proceeding on the judgment.

In Walls *v.* Palmer, 64 Ind. 493, an appeal was taken from a judgment suspending an attorney from the practice of law. It was held that a supersedeas, or stay of proceedings did not operate to restore to appellant his rights as an attorney, during the pendency of the appeal, the court basing its decision upon the fact that the judgment was self-executing.

In Central Union Telephone Co. *v.* State, 110 Ind. 203, the court used this language: "The effect of a supersedeas is to restrain the appellee from taking affirmative action to enforce his decree, but it does not authorize appellant to do what the decree prohibits him from doing."

It was held in Hawkins *v.* State, 126 Ind. 294, that an appeal from a decree awarding an injunction, or ar order refusing to dissolve an injunction, notwithstanding the execution of a su-

persedeas bond, does not vacate the injunction nor authorize its disobedience. The decree is effective and must be obeyed until reversed.

In State *v.* Kirkpatrick, 54 Iowa 373, it was held that a decree in a habeas corpus proceeding operates by virtue of its own force; that the decree deciding the legality or illegality of the detention takes effect at once upon its rendition without any other proceeding; there is nothing which can be stayed by an appeal and supersedeas, unless the decree is in effect set aside.

In People *v.* Stout, 10 Misc. (N. Y.) 247, 31 N. Y. Supp. 421, affirmed in 144 N. Y. 699, it was stated that if it were in the power of any court to delay the discharge of the prisoner after the imprisonment had once been held illegal, the writ would be deprived of its efficiency. Pending the appeal the order of the trial court must be given effect until reversed, even though the prisoner escapes.

The rule is laid down in Allen *v.* Church, 101 Iowa 116, that while it is the general rule that an appeal operates to stay all proceedings on a judgment, yet in the absence of specific statutory enactment, the rule does not apply where the judgment is self-executing. And in Randles *v.* Randles, 67 Ind. 434, and Relph *v.* Randles, 67 Ind. 600, it is held that under an act providing that an appeal with a bond "shall operate as a stay of all further proceedings on the judgment," a judgment which requires the issuance of no execution or writ of any character to give it effect, that is, a judgment which is self-executing, does not come within the purview of the statute. No further act of the court or its officers being necessary to carry out the judgment, it is in full force and binding upon the parties until reversed or annulled.

See authorities collected in an excellent note in 6 A. & E. Ann. Cas., p. 775.

It would indeed be an anomalous situation to permit a party to continue doing that which the decree or order forbids because of the execution of a supersedeas bond; the judgment itself would be destroyed. Were it not that a judgment of ouster is self-executing, a supersedeas would often operate to deprive the proper person of the office until the term had expired. An

order awarding the custody of a child in a habeas corpus proceeding judicially determines that the detention is illegal, unlawful and without authority and right; that order is the law of the land until reversed, and to permit a party to continue detaining a person unlawfully and illegally in absolute contravention of the order of the court, simply because a supersedeas bond is executed, would be a deplorable condition of the law. As an illustration of the results of such a rule, suppose a person, a refined and cultered woman, was detained at an insane asylum. Upon the hearing of habeas corpus proceedings the court adjudged the detention illegal and ordered the release of the person detained. Upon an appeal, and the execution of a supersedeas bond, to allow the defendant to continue the detention might result in a confinement for two or three years pending final determination of the case in the higher court; the very purpose and object of the writ itself is frustrated and destroyed; it would be no longer a remedial writ, affording summary relief.

The rule is laid down in 21 Cyc., p. 342, that in the absence of express statutory authorization, a supersedeas cannot be granted in a habeas corpus proceeding, and to the same effect in 9 Ency. Pl. & Pr., p. 1080.

In the recent case of Valentine *v.* Goldsmith, 35 D. C. App. 229, a supersedeas bond was given, and the child left in the custody of appellant, but in that case there was no objection made, and the right and authority to allow the supersedeas was not raised or questioned. Of course that case is not authority for the proposition under discussion.

II.

What has been said in the discussion of the first question is alike applicable to the right and authority of the Supreme Court of Appeals to award a supersedeas in a habeas corpus proceeding.

III.

Quære, is a statute constitutional which provides for a supersedeas in a habeas corpus case?

I am familiar with the case of Macready *v.* Wilcox, 33 Conn. 321, cited in 21 Cyc., p. 352, note 5, but it is suggested that the

writ of habeas corpus was designed and intended to afford immediate and summary relief to a person unlawfully deprived of his liberty; it is remedial in its nature, it is one of the bulwarks of liberty, and the very purpose and object of the writ is to liberate immediately one unlawfully deprived of his liberty. The American Constitution in art. 1, § 9, cl. 2, provides that "The privilege of the writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it," and the Virginia Constitution contains the same clause. Section 58.

To suspend a judgment, or award a supersedeas in a habeas corpus proceeding, leaving the person detained in the custody of appellant pending appeal, is certainly in effect suspending the privilege of the writ of habeas corpus. It is suspending that which the writ was designed to accomplish, namely, liberation of a person unlawfully detained: it is prolonging the imprisonment, the confinement, and is accomplishing that which the writ was designed to prevent. It is conceivable that by a supersedeas, a person may be detained and restrained of his liberty for years, although the lower court has declared the detention unlawful.

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Rosslyn Va.,
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